

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 24, 2007

STATE OF TENNESSEE v. MICHAEL VAUGHN

Appeal from the Circuit Court for Humphreys County
No. 10773-A George C. Sexton, Judge

No. M2006-01341-CCA-R3-CD - Filed August 14, 2007

Appellant, Michael Vaughn, was convicted of attempt to commit manufacture of methamphetamine, one count of possession of unlawful drug paraphernalia for delivery, one count of reckless endangerment with a deadly weapon, one count of evading arrest, one count of possession of a weapon by a convicted felon, one count of possession of marijuana, and one count of possession of drug paraphernalia. As a result, Appellant was sentenced to a total effective sentence of twenty-four years. After the denial of a motion for new trial, Appellant filed a timely notice of appeal. On appeal, Appellant argues that there was no probable cause for the stop, search and seizure that led to Appellant's arrest and that the trial court erred in sentencing Appellant. Because Appellant did not file a motion to suppress prior to trial and failed to raise the suppression issue in a motion for new trial, this issue is waived. Furthermore, we determine that the trial court properly sentenced appellant. Accordingly, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Michael E. Patrick, Waverly, Tennessee, for the appellant, Michael Vaughn.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Dan Alsobrooks, District Attorney General and Lisa C. Donegan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In October of 2004, Appellant was indicted by the Humphreys County Grand Jury for one count of manufacturing methamphetamine, one count of possession of a schedule II substance with the intent to sell or deliver, one count of possession of unlawful drug paraphernalia for delivery, one count of reckless endangerment with a deadly weapon, one count of evading arrest, one count of

possession of a weapon by a convicted felon, one count of possession of marijuana, and one count of possession of drug paraphernalia.

At trial, Deputy Eric Jernigan of the Humphreys County Sheriff's Department testified that on July 26, 2004, he was on routine patrol near the corner of Watson Lane and Old Nashville Highway. Sometime around 5:40 p.m., Deputy Jernigan witnessed Appellant drive by very slowly in an old Datsun-type car. The window of the car was rolled down slightly and Deputy Jernigan was able to make eye-contact with Appellant. Deputy Jernigan decided to follow the car and run the tags. The tags came back registered to a different car. Deputy Jernigan knew the name of the person to whom the tags belonged and knew that they did not belong to Appellant. Deputy Jernigan stated that the car crossed the double yellow line several times, back and forth, so he activated his blue lights to make a traffic stop. At that time, Appellant turned down Nesbitt Hollow Road, a dirt road.¹

Deputy Jernigan followed the car on Nesbitt Hollow Road for the time being, then the car sped up. Deputy Jernigan activated his siren and called dispatch to inform his dispatcher that he was attempting a traffic stop. Appellant turned around to look at the police car while he was driving, and Deputy Jernigan recognized him. Before he realized that Appellant was the driver, Deputy Jernigan had been going to stop the car for improper tags and erratic driving. After he realized that Appellant was the driver of the car, Deputy Jernigan decided to make the stop on the basis that there were outstanding warrants for Appellant.

Deputy Jernigan continued to chase Appellant. Appellant's speed fluctuated from twenty miles per hour to eighty miles per hour. The entire pursuit of Appellant's car lasted for approximately fifty-seven minutes and traveled through three counties and several roadblocks until Appellant was finally stopped when he wrecked at Mount Zion Road.

During the pursuit, several police agencies attempted to stop Appellant with four different roadblocks. Appellant was able to avoid each and every roadblock because the passenger in his car had a police scanner and was able to learn the location of the roadblocks. Throughout the pursuit of Appellant, up to six police vehicles attempted to stop Appellant. Appellant even swerved from side to side on the roadway to avoid other police cars. Deputy Jernigan stated that at one point, as they went around a curve, Appellant drove on the left side of the road in an attempt to block the deputy. Finally, as they approached Mount Zion Road, another officer, Tracy Herndon, bumped Appellant's car and caused it to spin. At that same time, Officer Jernigan was turning right to block Mount Zion Road. Deputy Jernigan's car hit Appellant's car. The two cars came to a stop on the edge of the woods with the police car sitting next to the passenger side of Appellant's car. Appellant jumped out of the car and started to run.

¹ According to the affidavit of complaint filed by Deputy Jernigan that formed the basis for Appellant's arrest, Appellant "cross[ed] over the center yellow line 4 to 5 times" while traveling "east bound on Nesbitt Hollow." At trial, Deputy Jernigan stated that Appellant crossed the lines on Old Nashville Highway and that Nesbitt Hollow Road, a dirt road, did not have any yellow lines. Deputy Jernigan admitted there was a discrepancy between his testimony at trial and the affidavit of complaint.

Deputy Paul Montgomery of the Dickson County Sheriff's Department was also involved in the pursuit of Appellant. His patrol car was equipped with a video camera and recorded a large portion of the pursuit. Deputy Montgomery was the first officer to approach Appellant when he ran from his car after the crash. Deputy Montgomery chased Appellant for about seventy yards through the woods until Appellant stumbled and fell. At that point, Deputy Montgomery took Appellant into custody.

Deputy Tracy Herndon of the Humphreys County Sheriff's Department was also involved in the pursuit of Appellant. After the crash, Deputy Herndon ordered the passenger out of the car. After the passenger was taken into custody, Deputy Herndon performed an inventory search of the car and discovered a 9-millimeter handgun behind the driver's seat and a semiautomatic handgun behind the passenger's seat. Both of the guns were loaded at the time they were recovered. Deputy Herndon testified that they also recovered the police scanner that the passenger was operating during the pursuit. A backpack was also found in the car. Officer Joseph Maples found marijuana in the backpack. Also inside the backpack was a twenty-ounce soda bottle with a tube running out of the end of the bottle. When the bottle was opened and the contents were exposed to the air, it started smoking. The officers had to back away from the smoke. A second backpack was located behind the driver's seat of the car. When it was unzipped, it started smoking. After being exposed to the smoke, Deputy Herndon began coughing and had irritation to his throat, lungs and eyes. Officer Maples began having chest pains and difficulty breathing. Two officers were sent to the emergency room and Deputy Herndon missed three days of work as a result of inhaling the smoke and fumes. According to Deputy Herndon, the car contained a "rolling meth lab."

As a result of finding the smoking substances in the car, the Drug Enforcement Administration was notified because methamphetamine is considered a hazardous material. Officer Kenneth Wright of the Camden Police Department testified at trial as a clandestine lab expert. He was called to the scene after Appellant was taken into custody. According to Officer Wright, the car contained a working meth lab.

At the conclusion of the proof, the jury found Appellant guilty of the lesser-included offense of attempt to commit manufacture of methamphetamine in count one,² one count of possession of unlawful drug paraphernalia for delivery in count three, one count of reckless endangerment with a deadly weapon in count four, one count of evading arrest in count five, one count of possession of a weapon by a convicted felon in count six, one count of possession of marijuana in count seven, and one count of possession of drug paraphernalia in count eight.

At a sentencing hearing, Appellant was sentenced as a Range II offender to eight years for attempt to commit manufacture of methamphetamine, four years for possession of unlawful drug paraphernalia for delivery, four years for reckless endangerment with a deadly weapon, four years for evading arrest, four years for possession of a weapon by a convicted felon, and eleven months and twenty-nine days for possession of marijuana and possession of drug paraphernalia. The trial

²The record includes an order of nolle prosequi for count two of the indictment which charged Appellant with possession of .5 gram or more of a schedule II drug (methamphetamine) with the intent to sell or deliver.

court ordered the sentence in count three to be served consecutive to count one; count four to be served consecutive to count three; count five to be served consecutive to count four; count six to be served consecutive to count five, and counts seven and eight to be served concurrent to count six, for a total effective sentence of twenty-four years. The trial court denied a motion for new trial, and this appeal followed. On appeal, Appellant challenges the search of his car and subsequent seizure of items as well as his sentence.

Analysis

Appellant argues on appeal that the stop, search and subsequent seizure of his car violated his Fourth Amendment rights. Specifically, Appellant argues that the State “did not carry their burden of demonstrating an exception to the warrant requirement.” The State argues that Appellant has waived this claim for failing to raise the issue in a properly-filed motion to suppress or a motion for new trial.

The record does not contain a written pre-trial motion to suppress filed by Appellant. The only mention made of suppressing the evidence, “based on improper stop” was made during trial by Appellant’s counsel after the conclusion of the State’s proof. The motion was made orally and denied by the trial court.

A motion to suppress evidence must be filed prior to the trial. *See State v. Coulter*, 67 S.W.3d 3, 37 (Tenn. Crim. App. 2001); *State v. Jon A. Engle*, No. W2005-01087-CCA-R3-CD, 2006 WL 668749 (Tenn. Crim. App., at Jackson, Mar. 16, 2006), *perm. app. denied*, (Tenn. Sept. 5, 2006). The requirement is enumerated in Tennessee Rule of Criminal Procedure 12(b)(2)(c), which provides that motions to suppress evidence must be raised prior to trial. “The rule is applicable when a claim of a constitutional right is involved whose violation would lead to suppression of evidence.” *State v. Goss*, 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998). Moreover, like other motions, a motion to suppress is governed by Tennessee Rule of Criminal Procedure 47 which requires motions to be in writing unless the court has permitted an oral motion. *State v. Bell*, 832 S.W.2d 583, 588 (Tenn. Crim. App. 1991); *State v. Burton*, 751 S.W.2d 440, 445 (Tenn. Crim. App. 1988). Failure to file a pre-trial motion to suppress will result in a waiver on appeal of the right to contest the admissibility of evidence. Tenn. R. Crim. P. 12(f)(1); *State v. Eldridge*, 749 S.W.2d 756, 757 (Tenn. Crim. App. 1988). Such motions in rare cases may be made and determined during trial, but good cause must be shown for the deferment. *State v. Wilson*, 611 S.W.2d 843, 846 (Tenn. Crim. App. 1980). In the instant case there is no written suppression motion and no good cause is shown for the way the subject was handled at the close of the State’s proof. This issue is waived.

Moreover, this issue is waived for the reason that it was not raised in a motion for new trial, as required by Tennessee Rule of Appellate Procedure 3(e), which provides in pertinent part:

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless

the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Accordingly, this issue is waived.

Sentencing

Next, Appellant claims that the trial court improperly sentenced him. Specifically, Appellant argues that the trial court used deterrence as a factor in determining whether he should be incarcerated and to enhance his sentence within the range. The State counters that the trial court did not use deterrence as a factor in enhancing Appellant's sentence.

“When reviewing sentencing issues . . . , the appellate court shall conduct a *de novo* review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant’s potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant’s statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” *Ashby*, 823 S.W.2d at 169. In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant’s behalf about sentencing; and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).³

³ In response to *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee Legislature amended T.C.A. § 40-35-210 so that Class A felonies now have a presumptive sentence beginning at the minimum of the sentencing range. Compare T.C.A. § 40-35-210(c) (2003) with T.C.A. § 40-35-210(c) (2006). This amendment became effective on June 7, 2005. The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their *ex post facto* protections. *Id.* Appellant herein committed the offenses on July 26, 2004 and was sentenced on June 21, 2005. There is no waiver executed by Appellant in the record herein. Thus, the amendment to T.C.A. § 40-35-210 does not apply to Appellant.

Appellant herein was convicted of attempt to commit manufacture of methamphetamine, a Class D felony, possession of unlawful drug paraphernalia for delivery, a Class E felony, reckless endangerment with a deadly weapon, a Class E felony, evading arrest, a Class E felony, possession of a weapon by a convicted felon, a Class E felony, possession of marijuana, a Class A misdemeanor, and possession of drug paraphernalia, a Class A misdemeanor. As a Range II offender, Appellant was subject to a sentence of not less than four nor more than eight years for his Class D felony conviction and not less than two nor more than four years for each of his Class E felony convictions. T.C.A. § 40-35-112(b)(4) & (5). In determining the length of Appellant's sentences, the trial court relied on the following enhancement factors: (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (8) the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community because Appellant was on bond for a prior aggravated burglary conviction at the time of the offense; and (10) the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(1), -(8), & -(10).

Appellant does not challenge the trial court's application of the enhancement factors to his sentence, and we determine that the record supports the application of those enhancement factors. Appellant had a number of prior convictions in addition to those necessary to establish the appropriate range. Furthermore, Appellant does not dispute that he committed the offenses herein while on bond for a previous crime or that he committed offenses where the risk to human life was high. Instead, Appellant argues that the trial court used deterrence as a factor in enhancing the sentences. At the sentencing hearing, the trial court noted that confinement was "particularly suited to provide an effective deterrent to others likely to commit a similar offense" and then went on to note the findings with regard to enhancement factors. The only other comment the trial court made in reference to deterrence was as follows, "[A]nyone with half a mind can see that meth is a major problem in Humphreys County and something has got to be done to put a stop to it. Hopefully today we made a little dent in it." The record does not show that the trial court used deterrence as a factor in enhancing Appellant's sentence. Appellant has failed to show that the length of his sentence is improper.⁴ This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

⁴We also note that Appellant has not challenged his sentence in light of the United States Supreme Court decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), or, more recently *Cunningham v. California*, 549 U.S. ___, 127 S.Ct. 856 (2007), which called into question our supreme court's decision in *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005), in which the Tennessee Supreme Court determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury nor admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with *Blakely*. Shortly after the release of *Cunningham*, the United States Supreme Court vacated the judgment in *Gomez* and remanded the case to Tennessee Supreme Court in light of *Cunningham*. *Gomez v. Tennessee*, __ U.S. ___, 127 S.Ct. 1209 (2007). Due to Appellant's failure to raise the challenge to his sentence via *Blakely* or *Cunningham*, we decline to address any issue in that regard.

JERRY L. SMITH, JUDGE